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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CRYSTAL CHARLENE TIBBE, Plaintiff and Appellant, v. JUSTICE JONES et al., Defendants and Respondents.	E046911 (Super.Ct.No. NCVNS001011) OPINION

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Girardi and Keese and John A. Girardi for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, and Richard J. Rojo and Mark V. Santa Romana, Deputy Attorneys General, for Defendants and Appellants.

I. INTRODUCTION

Plaintiff Crystal Charlene Tibbe appeals from judgment following the trial court's granting of a motion for summary judgment in favor of defendants Justice Jones, Andrew Avila, Rob Anderson, and Bruce Weaver in plaintiff's action for malicious prosecution and deprivation of civil rights in violation of 42 U.S.C. § 1983 (hereafter, section 1983). Plaintiff contends the trial court erred in granting summary judgment because (1) she presented sufficient evidence from which a reasonable jury could conclude that the defendants intentionally omitted information from their reports that prevented the prosecutor from exercising independent judgment; (2) the prosecutor's finding of probable cause was based solely on a false and misleading police report designed to cast plaintiff in a guilty light; and (3) she presented sufficient evidence from which a reasonable jury could conclude that the officers lacked probable cause in recommending charges against her. We find no error, and we affirm.

II. FACTS AND PROCEDURAL BACKGROUND

In 2003, the car plaintiff was driving collided head on with a motorcycle driven by Steven Richard Place. Place was killed, and plaintiff suffered burns and contusions. Place and his coworker, Johnny Joe Martin, had been testing motorcycles at the time of the accident.

California Highway Patrol (CHP) Officer Justice Jones, who was the first officer to arrive at the scene, was designated the primary investigator of the accident. He interviewed Martin and plaintiff at the scene and documented the physical evidence there.

Plaintiff was 20 years old at the time of the accident. Officer Jones smelled alcohol on her breath, and she admitted having drunk one beer an hour earlier. Plaintiff's blood alcohol content was determined to be .06 percent. Plaintiff told Officer Jones that she had been driving north on U.S. 95 at 60 miles per hour when she saw two motorcycles coming toward her in the northbound lane just before the crash.

CHP Officer Andrew Avila also responded to the scene of the accident. Martin told Officer Avila at the scene that he and Place had been traveling south on U.S. 95 when a car came across the roadway at a curve and struck Place. Avila saw vehicle fluids and gouge marks in the southbound lane.

Officer Jones concluded plaintiff had committed a crime, and he requested that his police report be sent to the San Bernardino County District Attorney for prosecution. Pursuant to the custom and practice in cases involving deaths, the file was sent to a supervising deputy district attorney for a determination on whether to file charges. Supervising Deputy District Attorney Gary Roth decided there was sufficient evidence to charge plaintiff with vehicular manslaughter (Pen. Code, § 192, subd. (c)(3)) and the district attorney filed criminal charges against plaintiff.

In April 2005, plaintiff entered a plea of no contest to violating Vehicle Code section 23103.5 (reckless driving). Thereafter, her attorney spoke to an emergency medical technician, Jack Reeve, who had been present at the accident scene. Reeve disclosed that he had overheard Martin make a statement on the night of the accident to the effect that the accident had been decedent's fault. Reeve thereafter provided a signed

declaration that he "heard the motorcyclist say to the officer that his friend was taking the curve too fast and crossed into the northbound lane and it was his fault." Reeve continued, "I am positive that is what the other motorcyclist said. This conversation took place before I went into the ambulance and heard [plaintiff] say the motorcyclist came into her lane." The statement Reeve described was not contained in the police report submitted by Officer Jones. Martin consistently testified and stated in conversations with plaintiff's counsel in the underlying action that Place had not crossed into the northbound lane. Martin denied ever telling an officer that Place had done so.

Plaintiff moved successfully to set aside the plea agreement, and the criminal case proceeded to trial. Following trial, the jury found plaintiff not guilty.

Plaintiff thereafter filed her operative first amended complaint naming Officers Jones, Avila, Anderson, and Weaver as defendants in the third and fourth causes of action based on section 1983.[1] In her third cause of action, plaintiff alleged: "Prior to the arrest of plaintiff and the initiating of any criminal proceedings, defendants, and each of them, had evidence and statements in their possession which would have substantiated that plaintiff had not committed a crime for which she was arrested, tried and acquitted. Defendants were in possession of statements by Mr. Johnny Martin which clearly acknowledged that the decedent had taken the curve of the road too quickly and had traveled into the northbound lanes of the highway, thus causing the subject accident.

[1] Plaintiff also alleged other causes of action against other defendants not relevant to this appeal.

These statements that were willfully suppressed by the officers were not reflected in the incident's police report and were not brought to the prosecutor's attention." The complaint continued: "Defendants and each of them further failed to adequately investigate the circumstances of the accident and failed to and [*sic*] disclose the exculpatory evidence and statement concerning plaintiff which was known to defendants. In this regard, defendants and each of them failed to timely and adequately investigate the evidence and statements which they possessed and which were available."

In her fourth cause of action against those defendants for failure to disclose exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) and section 1983, plaintiff alleged, "Each and every government related defendant named herein had exculpatory evidence available to him sometime prior to plaintiff being charged with the crime of violation of [Penal Code] section 19[,] [subdivision] (c)(3). None of the defendants ever informed the plaintiff or her counsel of the exculpatory evidence in violation of [*Brady*]. Under [*Brady*], the government must disclose any evidence favorable to an accused which is material either to guilt or to punishment. Failure to do so is a due process violation. In this connection, plaintiff alleges that defendants and each of them delayed and/or failed to investigate or discover said evidence in order to punish and maintain the charges against plaintiff." (Underlining omitted.)

Defendants moved for summary judgment. To support their motion, they provided the declaration of David Varman, the deputy district attorney who had made the

decision to continue with the prosecution of plaintiff for vehicular manslaughter after Reeve's exculpatory statement was revealed. Varman stated in his declaration: "Shortly [after plaintiff moved to set aside her plea agreement, her defense counsel] told me about a statement he obtained from the emergency medical technician, Mr. Reeve, who claimed to have overheard Mr. Martin state that Mr. Place was on the wrong side of the road. *After receiving this information, I weighed the other evidence in the case against Mr. Reeve's statement and concluded that the latter is not entitled to much weight.* On the one hand, (1) Mr. Reeve could not positively identify the person who he allegedly overheard making the statement about Mr. Place's conduct that night; (2) Mr. Reeve could not identify the police officer he contended was present when the statement was made; (3) Mr. Reeve's perception of the event was 'brief,' and, (4) Mr. Reeve could not provide sufficient details of the circumstances surrounding the alleged conversation. On the other hand, I had an eyewitness who was steadfast in his statement that Plaintiff was on the wrong side of the road at the time of the impact and that he smelled a strong odor of alcohol on the Plaintiff on the night of the incident. I also had ample physical and scientific evidence that supported that testimony. *Based on my analysis of the evidence, I exercised the broad prosecutorial discretion I am accorded by law and declined to dismiss the People's case against Plaintiff on the basis of Mr. Reeve's statement.*" (Italics added.)

The trial court granted the motion for summary judgment and thereafter entered judgment in favor of defendants.

III. DISCUSSION

A. Standard of Review

The trial court must grant a motion for summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden of showing that a cause of action has no merit, either by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849-850.)

This court reviews de novo an order granting summary judgment (*Certain Underwriters at Lloyd's of London v. Superior Court* (2001) 24 Cal.4th 945, 972), and in doing so, we view the evidence in the light most favorable to the nonmoving party. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) In conducting our independent review of the evidence, "we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.)

B. Issues Framed by Pleadings

Plaintiff alleged in her third and fourth causes of action that defendants had violated section 1983 by depriving her of her rights to be free from malicious prosecution and to a fair trial.

1. Elements of Section 1983 Cause of Action Based on Malicious Prosecution

Police officers have qualified immunity under section 1983, which shields them from liability if they reasonably believe in good faith that their actions are constitutional. (*Pierson v. Ray* (1967) 386 U.S. 547, 557.) Plaintiff's third cause of action against defendants was based on a deprivation of civil rights through malicious prosecution. To prevail on a claim of malicious prosecution, the plaintiff must establish that "the prior action (1) was commenced by or at the direction of the defendant and pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. [Citations.]" (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 128.) And to recover in a section 1983 action, a plaintiff must show both that probable cause did not exist and that the officer did not reasonably believe in good faith that probable cause existed. (See *Smiddy v. Varney* (9th Cir. 1981) 665 F.2d 261, 266 (*Smiddy I*), overruled in part on other grounds by *Beck v. City of Upland* (9th Cir. 2008) 527 F.3d 853, 865.) An officer may be liable if he interferes with the prosecutor's independent judgment, by, among other things, failing to disclose exculpatory evidence or omitting material information from reports. (See, e.g., *Blankenhorn v. City of Orange*

(9th Cir. 2007) 485 F.3d 463, 482 ["A police officer who maliciously or recklessly makes false reports to the prosecutor may be held liable for damages incurred as a proximate result of those reports."].)

In *Smiddy I*, the court stated, "[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted. . . ." (*Smiddy I*, *supra*, 665 F.2d at p. 267.) In *Smiddy v. Varney* (9th Cir. 1986) 803 F.2d 1469 (*Smiddy II*), the court explained its earlier holding: "[T]here is a rebuttable presumption that a prosecutor exercises independent judgment regarding the existence of probable cause in filing a complaint. The presumption can be overcome, for example, by evidence that the officers knowingly submitted false information or pressured the prosecutor to act contrary to her independent judgment. [Citation.] Unless overcome, the presumption insulates the arresting officers from liability for harm suffered after the prosecutor initiated formal prosecution. [Citation.]" (*Id.* at p. 1471.) The presumption of the prosecutor's independent judgment may be rebutted by evidence that investigating officers omitted material information in reports provided to the prosecutor. (*Borunda v. Richmond* (9th Cir. 1988) 885 F.2d 1384, 1390; *Barlow v. Ground* (9th Cir. 1991) 943 F.2d 1132, 1137.)

The case of *Lasic v. Moreno* (E.D. Cal. 2007) 504 F.Supp.2d 917, presented material facts substantially similar to those of the present case. In that case, a post office

manager brought a civil rights action alleging he had been maliciously prosecuted for witness tampering in connection with an investigation of one of his subordinates. (*Id*. at pp. 919-920.) The post office inspector who recommended that charges be brought against the plaintiff failed to timely produce exculpatory emails from the plaintiff. (*Id.* at p. 922.) However, those emails were provided to the prosecutors before the trial at which the plaintiff was acquitted, and after the exculpatory evidence was provided, the prosecutors nonetheless decided to proceed with the criminal case against the plaintiff. (*Ibid*.) In the civil rights action, the trial court granted summary judgment to the defendants. (*Id.* at p. 924.) The trial court determined that the plaintiff had failed to establish a lack of probable cause for continuing with the prosecution when two prosecutors had determined to proceed with the prosecution even after the disclosure of allegedly exculpatory evidence. (*Ibid.*)

2. Negation of Plaintiff's Claim

Deputy District Attorney Varman stated in his declaration that after plaintiff moved to set aside her plea agreement, he learned of Reeve's statement. Varman stated that he weighed Reeve's statement against other eyewitness testimony and the physical and scientific evidence and determined to continue with the prosecution. The police report that omitted the conversation Reeves had reported hearing was therefore only one piece of evidence the prosecutor used in determining whether to proceed.

As in *Lasic v. Moreno*, a prosecutor made a second determination to proceed with the prosecution after the previously undisclosed exculpatory information was brought to

his attention. (*Lasic v. Moreno*, *supra*, 504 F.Supp.2d at p. 924.) We therefore conclude defendants have established that the prosecutor did in fact exercise independent judgment. (*Ibid.*; *Smiddy I, supra*, 655 F.2d at p. 267.) The trial court did not err in granting defendants' motion for summary judgment.

3. Section 1983 Claim Based on Brady Violation

Plaintiff's fourth cause of action alleged that defendants withheld exculpatory evidence in violation of *Brady*. On appeal, plaintiff has not raised any issue as to that cause of action, and we therefore deem any such issue waived.

IV. DISPOSITION

The judgment is affirmed. Costs are awarded to Respondents.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

GAUT
J.